



Office of the General Counsel
Maryland-National Capital Park and Planning Commission

Reply To

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October 10, 2005

Delivery Via Email and Regular U.S. Mail

Michael E. Faden, Esquire
Senior Legislative Counsel
County Council of Montgomery County, Maryland
100 Maryland Avenue, 6th Floor
Rockville, Maryland 20850

Re: Fact-Finding Review of Clarksburg Town Center
Approval Process and Compliance Results

Dear Mike:

On behalf of the Montgomery County Planning Board (the "Board") of the Maryland-National Capital Park and Planning Commission (the "Commission"), this letter is to follow up on our recent discussion regarding the Montgomery County Office of Legislative Oversight's (the "OLO") informal request to interview the Board and Commission attorneys in connection with its fact-finding review of the Clarksburg Town Center land use development approval and implementation process. First, let me say that we appreciate the OLO's agreeing to defer interviewing the Board and its attorneys for the time being, and I want to thank you and Karen Orlansky for devoting the time for a meaningful dialogue on these nettlesome issues. Secondly, per your request, let me describe our perspective on these issues.

At the outset, I must underscore the Board's intention to continue cooperating fully with OLO's review of the approval process and related compliance issues in Clarksburg. As of this date, our staff has devoted many hours to providing information to OLO. We have and will continue to make every effort to facilitate OLO's work. We share in a fundamental understanding that the citizens of Montgomery County deserve no less.

In connection with its review of the Clarksburg Town Center development process, OLO has raised with us the possibility of its interviewing Board members and Board attorneys. As I indicated during our recent telephone calls and meetings, while we

have no objection to such interviews in principle, we believe that such communication at this time -- while the Clarksburg Town Center cases remain pending -- would impair the public interest and would be contrary to established legal principles. Our concern is based upon the fact that the Board's jurisdiction over most site-specific land use proposals constitutes an exercise of quasi-judicial authority.^{1/} As such, the Fourteenth Amendment compels the Board to afford each applicant and aggrieved party with procedural due process in these cases; that is, a process applied to adjudicate competing property interests that is fundamentally fair in all material respects.^{2/}

Ex Parte Communications With the Board

Based upon the constitutional principles of due process, the Board has promulgated its Rules of Procedure (the "Rules") which generally prohibit members of the Board from communicating outside of the public process about the merits of contested cases while those cases are pending.^{3/} In order to ensure that each Board decision is based upon information presented on the public record, and that each party is given a fair opportunity to challenge any information that is adverse to their position, a member of the Planning Board who entertains *ex parte* communication concerning the substance of a pending case may have an ethical obligation to abstain from voting in order to avoid the appearance of undue influence or bias in the decision-making process.^{4/}

^{1/} *Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (Md. 1962) (Board exercises quasi-judicial authority in approving or disapproving plan of subdivision). *Accord City of Bowie v. Prince George's County*, 384 Md. 413, 863 A.2d 976 (Md. 2004). *See also Sheetz, Inc. v. Frederick City Planning Commission*, 106 Md.App. 531, 665 A.2d 327 (Md.App. 1995) (local planning commission exercises quasi-judicial authority in approving or disapproving site plan).

^{2/} *See generally Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) (due process requires impartial decision-making based "solely" on the legal rules and evidence adduced during the adjudicatory process).

^{3/} The Rules provide in relevant part as follows:

No member of the Planning Board may communicate *ex parte*, or outside of the record, with any person regarding the merits of a contested case. The members may, however, communicate with each other, or with legal counsel concerning legal matters.

The Rules of Procedure for the Montgomery County Planning Board, Maryland-National Capital Park and Planning Commission (Rev. Jan. 13, 2005), at § 10(a).

^{4/} *See* Maryland Public Ethics Law § 15-101(a) ("the people have a right to be assured that the impartiality and independent judgment of [government] officials and employees will be maintained"); Zoning: Proof of Bias or Conflict of Interest in Zoning Decisions, 32 Am. Jur. POF 3d (2004), at § 16 ("Proof of *ex parte* contacts may also show that a zoning decision was tainted by bias, although this may be tolerated by the courts as a part of the political process... However, when *ex parte* contacts are present in the context of quasi-judicial zoning decisions, such as variances and special use permits, courts will be more receptive to challenges to decisions on grounds of zoning bias...") (Footnotes omitted).

In the context of possible communications between the OLO and the Board, the question arises whether the entire Board would be forced to recuse itself or, perhaps more likely, whether the applicant and citizen complainants would have viable claims grounded in the principles of procedural due process to successfully challenge any decision the Board ultimately makes.^{5/}

In order to ensure that it fulfills its adjudicatory role and maintains the integrity of the process, the Board believes that it cannot properly have communications with OLO during the pendency of the Clarksburg cases. The Board's approach here rests on fundamental principles articulated not only by its own rules as reflected above, but also in federal law.^{6/} An interview of the Board simply would not square with the comparable "ground rules" developed at the federal level for comparable circumstances.

On the Board's behalf, we have provided the OLO with complete transcripts and tape records of the relevant public Board hearings. We have proposed that the OLO review these materials to determine whether they provide the OLO with the information that it needs to conduct its inquiry. We have also suggested that OLO determine whether it has questions for the Board that do not implicate the merits of the Clarksburg case and accordingly, if posed, would not violate the rules and legal principals outlined above. We have also discussed with you deferring any potential interviews until the pending cases in Clarksburg have been resolved. It is our understanding that OLO has agreed to defer this issue. Accordingly, I anticipate that we will stay in touch with your office in order to ensure that OLO has the information that it needs without jeopardizing the integrity of the Board's decisions.

^{5/} See, e.g., *Vance v. Housing Opportunities Commission of Montgomery County*, 332 F.Supp.2d 832 (D.Md. 2004) (federal court reversed decision of County administrative tribunal based, in part, on "serious due process concerns" with evidence of *ex parte* communications after respondent departed a pertinent appeal hearing).

^{6/} As the Fifth Circuit has put it, for Congress "to subject an [FTC] administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision sacrifices the appearance of impartiality – the sine qua non of American judicial justice." *Pillsbury v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). See also Hearings on Accounting Irregularities at Fannie Mae Before the House Committee on Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, February 9, 2005 (subcommittee chair proposes that agency witnesses decline to answer questions relating to pending investigation); see also 28 C.F.R. § 50.2(c) ("DOJ personnel "shall not during its investigation or litigation make or participate in making an extrajudicial statement . . . if there is a reasonable likelihood that such dissemination will interfere with a fair trial"); Memorandum of United States Attorney General Herbert Brownell, May 15, 1956 ("If the request [for information from Congress] concerns an open case, i.e. one which litigation or administrative action is pending or contemplated, the file may not be available for examination by the committee's representative").

Questioning of Board Attorneys

My concerns here are similar to those expressed above regarding communications with the Board. Neither the Board nor its counsel may have communications with third parties that could jeopardize the Board's statutory responsibilities. Answers to your questions by an attorney who represents the Board during the pendency of a contested case could be attributed to the tribunal itself, thereby raising the due process concerns outlined above. Moreover, interviewing Board attorneys raises substantial attorney-client and deliberative process privilege issues. As the U.S. Fourth Circuit Court of Appeals indicated in one recent case:^{7/}

The government has the same right to undisclosed legal advice in anticipation of litigation as any private party. And there is nothing in FOIA that prevents the government from drawing confidential counsel from the private sector. Allowing disclosure here would impair an agency's ability to prepare effectively for litigation with private parties and thereby thwart its ability to discharge its functions in the public interest.

To the extent that OLO envisions questioning Board attorneys regarding legal advice that the attorneys gave to the Board regarding the Clarksburg cases or the legal issues implicated in them, their disclosures would "impair [the Board's] ability to prepare effectively for litigation" and "thwart [its] ability to discharge [its] functions in the public interest." A party affected by any decision the Board renders in Clarksburg could well take the position that by allowing its counsel to answer questions posed by the OLO, the Board waived the attorney client and/or deliberative process privileges. A decision that a waiver occurred would provide the litigants challenging the Board's decisions access to the confidential advice counsel provided the Board.^{8/} This is really an unnecessary risk that could deprive the Board of the right to "undisclosed legal advice," interfere with its ability to conduct private deliberations and jeopardize the Board's ability to defend its decisions in any subsequent litigation.

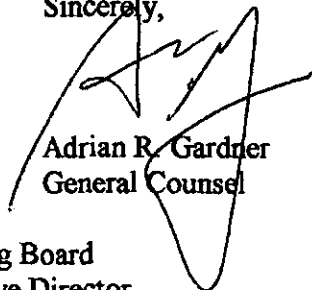
^{7/} *Hanson v. U.S.A.I.D.*, 372 F.3d 286 (4th Cir. 2004).

^{8/} We view this risk as hardly remote given the charged nature of the Clarksburg matter and the law regarding subject matter waiver in the attorney client privilege context. See, e.g., *In re Grand Jury Subpoena*, 341 F.3d 331 (4th Cir. 2003) (implied waiver occurs when the party claiming the privilege has made any disclosure of a confidential communication to any individual who is not embraced by the privilege. Such a disclosure vitiates the confidentiality that constitutes the essence of the attorney-client privilege)(emphasis added); *U.S. v. (Under Seal)*, 1988 WL 76110 (4th Cir. 1998)(any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter).

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We do not believe that the Board and the OLO should, consistent with their responsibilities to the citizens of Maryland, create a situation that could so jeopardize the Board's ongoing work and further complicate its statutory mandate in the extraordinary circumstances at Clarksburg. We will, of course, continue to make every effort – consistent with our legal obligations – to provide the OLO with the information that it needs to complete its inquiry. Please feel free to call me if you would like to further discuss any of the matters addressed in this letter or if we can otherwise be of assistance to you.

Sincerely,



Adrian R. Gardner
General Counsel

cc: The Montgomery County Planning Board
Trudye Morgan Johnson, Executive Director
Patricia Colihan Barney, Secretary-Treasurer
Karen A. Orlansky, Director, Office of Legislative Oversight